

(2017) 01 BOM CK 0168
In the Bombay High Court
Case No : 1614 of 2015

Manoj Javeri Stock Broking Pvt.Ltd.

APPELLANT

Vs

Gopika S. Mehta

RESPONDENT

Date of Decision : 30-01-2017

Acts Referred:

[Arbitration and Conciliation Act, 1996](#), [Section 34](#) - Application for setting aside arbitral award

Citation : (2017) 01 BOM CK 0168

Hon'ble Judges : N.M. Jamdar

Bench : SINGLE BENCH

Advocate : Simil Purohit, A.P. Mukary, Sharan Jagtiani, Mona Bhide, Biswadeep Chakravarty, Chandramauli, Dave, Girish

Judgement

1. By this Arbitration Petition under Section 34 of the Arbitration and Conciliation Act, 1996, the Petitioner has challenged the Award of the Arbitral Tribunal and the Appellate Tribunal dated 17 September 2013 and 4 April 2014 of the Bombay Stock Exchange. The claim was made by the Respondent against the Petitioner which was treated as Arbitration Reference No. 10 of 2013. The claim was made in respect of 2,13,333 shares of Wipro Limited. It was the case of the Respondent that she is resident of Canada and constituent of the Petitioner. The Petitioner is the member of Bombay Stock Exchange have clearing No. 421 and SEBI Registration No. INB 010994933. The Respondent contended that from time to time she was buying and selling shares through the Petitioner and had deposited 22,000 equity shares of Wipro Limited for safe keeping and for delivery of the same in the market as per the directions of the Respondent. It was the case of the Respondent that this fact was acknowledged by the Petitioner from time to time. Subsequently, 44,000 bonus shares were received on 28 June 2004 and 66,000 shares were received on 23 August 2005, which fact was also contended by the Petitioner. By communication dated 23 August 2005, the fact that the Petitioner was holding 1,32,000 shares of Wipro Limited was confirmed by the Petitioner. According to the Respondent, interim dividend were paid on 14

January 2010. Some shares were returned to the Petitioner and also dividends were paid. According to the Respondent, this transaction between the parties went on till the Respondent decided not to sell share and addressed a letter to the Petitioner on 20 September 2011 which was replied to by the Petitioner seeking time to take steps in pursuance to the request. Since shares were not returned, the Respondent filed a complaint before the Investors Grievance Redressal Committee and Bombay Stock Exchange. To this complaint, the Petitioner filed a Reply and took stand that no such shares were received and even if received, they were in respect of some other transactions. Thereafter, the Respondent invoked the provisions of Arbitration under the ByeLaws framed by the Bombay Stock Exchange and the matter was referred to the Arbitrator.

2. The Respondent filed statement of claim. The Petitioner filed the Written Statement and took up various grounds including that of jurisdiction of the Arbitrator and limitation in making a claim. It was stated that no transaction had taken place between the Respondent and the Petitioner on the Bombay Stock Exchange. It was also stated that the shares, which were received, were in respect of the transaction which had nothing to do with the Stock Exchange. Accordingly, the Petitioner sought dismissal of the claim of the Respondent.

3. The learned Arbitrator considered the issue of jurisdiction raised by the Petitioner and held that the ByeLaw No. 248 of the Bombay Stock Exchange is stated in wide terms and the dispute of the present nature between the Petitioner and the Respondent also fell within the ambit of the said ByeLaws. As regard the issue of limitation is concerned, the learned Arbitrator held that the claim made was within the limitation and that after refusal of the Petitioner to return the shares, the claim has been filed within time. The learned Arbitrator, on merits, held that the correspondence would clearly show that the shares were given by the Respondent to the Petitioner for the purpose of selling the same and till instructions were issued for the purpose of safe keeping, they have been wrongfully not returned. The learned Arbitrator however, relying on the ByeLaw No. 244 limited the relief to be granted to the Respondent, holding that the closing price would be of 15 days in respect of the said shares and accordingly, calculated the damages to be paid to the Respondent. The learned Arbitrator granted monetary damages, as the Petitioner failed even to disclose as to the whereabouts of the shares. The Award was passed on 17 September 2013.

4. The Respondent thereafter, filed an Appeal No. 11A of 2013 before the Appellate Tribunal of the Bombay Stock Exchange in respect of restricting the claim of the Respondent to Rs. 5,02,89,920/with interest from 16 June 2009. According to the Respondent, the Respondent was entitled to the full claim as sought for. The Petitioner filed Cross Objections and reiterated the stand taken before the learned Arbitrator. The Appellate Tribunal rejected the Cross Objections of the Petitioner confirming the findings of the learned Arbitrator. The Appellate Tribunal accepted the contentions of the Respondent that ByeLaw No. 244 had no application to the facts of the present case and that total entitlement

of the Respondent of Rs. 8,71,01,730.57 ought to have been granted and accordingly, the same was granted by an Award dated 4 April 2014. The Appellate Tribunal also granted interest at the rate of 18 percent and the costs of arbitration. Challenging this, the present Arbitration Petition has been filed.

5. I have heard Mr. Simil Purohit, the learned Counsel for the Petitioner and Mr. Sharan Jagtiani, the learned Counsel for the Respondent.

6. Mr. Simil Purohit, the learned Counsel for the Petitioner contended that there was no jurisdiction for the learned Arbitrator and the Appellate Tribunal to entertain the claim of Respondent. He submitted that there was neither any written contract nor any trading that took place in the present case, and therefore, ByeLaw No. 248 does not apply to the facts of the present case. He submitted that the word "dealings" has been specifically used in the said ByeLaws and the ByeLaw No. 244 plays down on bargain transaction dealings and contract will have the same meaning. Mr. Purohit submitted that there was a purely private arrangement between the parties which will not be covered in the ambit of ByeLaw No. 248. Second arguments that was advanced was based on ByeLaw No. 244 to contend that this ByeLaws is clearly applicable and rightly held by the learned Arbitrator to be applicable though in different context. He submitted that in view of this ByeLaw No. 244, the claim of the Respondent was not within limitation. Mr. Purohit submitted that even assuming the case of the Respondent that there was a contract, the breach of contract and consequences thereof has been provided in ByeLaw No. 244 and this breach will have to be considered as a starting point of limitation as well as for fixing the liability of the Petitioner if any. On merits it was sought to be contended that arrangement between the parties was a private arrangement and the Petitioner is not liable to return the shares or to pay the value of the same.

7. First contention raised by Mr. Purohit, which is the main contention advanced, is regarding the jurisdiction of the Arbitrator. It will have to be kept in mind that the learned Arbitrator and Appellate Tribunal have interpreted the ByeLaw No. 248 and have held that they have jurisdiction to decide the claim of the Respondent. This is a two tier Arbitral Forum constituted by the Bombay Stock Exchange to deal with disputes. In that sense this forum is an expert body. Therefore, defence will have to be given to the interpretation of the byeLaws placed by such expert body who is entrusted with the task of resolution of disputes which routinely arise for their consideration. Furthermore, keeping in mind the limited scope that is available under Section 34 of the Arbitration and Conciliation Act, 1996, the enquiry will be restricted only to find out whether the interpretation placed by the Arbitrator on ByeLaw No. 248 A is an impossible, or is perverse.

8. The relevant ByeLaw No. 248(A) reads thus :-

" 248(A) All claims (whether admitted or not) difference and disputes between a member and a nonmember or nonmembers (the terms "nonmember" and

"nonmembers" shall include a remisier, authorised clerk, a subbroker who is registered with SEBI as affiliated with that member or employee or any other person with whom the member shares brokerage) arising out of or in relation to dealings, transactions and contracts made subject to the Rules, ByeLaws and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their construction, fulfillment or validity or in relation to the rights, obligations and liabilities of remisiers, authorised clerks, subbrokers, constituents, employees or any other persons with whom the member shares brokerage in relation to such dealings, transactions and contracts shall be referred to and decided by arbitration as provided in the Rules, ByeLaw and Regulations of the Exchange."

(emphasis supplied)

9. As rightly pointed out by Mr. Sharan Jagtiani, the learned Counsel for the Respondent, that in ByeLaw No. 248, general phrases have been used to indicate the widest possible amplitude. This ByeLaw employs phrases such as "arising out of" "in relation to" "incidental". The meanings attached to such general terms are well settled. Deliberate use of such terms indicate the intention of the frames to cover a wide array subject. Therefore, ByeLaw No. 248A not only covers the dispute relating to that the "dealings", "transactions" and "contract", "rights" and "liabilities" but also anything "incidental" or "pursuant" thereto. This ByeLaw has been framed by the Stock Exchange to regulate the dealings on the exchange and for the purpose of resolving disputes. These disputes are peculiar and specialised in nature and for that purpose expert bodies are constituted for their resolution. Avenue of arbitration has been provided to facilitate the speedy resolution of various disputes, which if left unresolved would impede smooth functioning of the Stock Exchange. Keeping these objectives in mind, language of wide amplitude has been deliberately employed in clause 248A. Both, the learned Arbitrator and the Appellate Tribunal, have chosen to give a broad meaning to this ByeLaw. This approach is in consonance with the intention of behind framing the said ByeLaws and in consonance with the language used and cannot possibly be stated as a perverse approach.

10. This however, will not mean that any dispute of whatsoever nature falls within the ambit of said clause. Whether the dispute falls within the ambit of ByeLaws will depend on facts of each case. It will have to be examined whether the transaction in question relates to dealing or is incidental or pursuant to dealing, arising out of rights and obligations and liabilities of constituents, brokers, etc.

11. Mr. Purohit, the learned Counsel for the Petitioner has advanced two submissions in this regard. Firstly, there is no written contract and secondly, there is no trading on the floor of the Stock Exchange. As far as the requirement of written contract is concerned, the learned Single Judge of this Court in the case of Hemendra V. Shah vs Stock Exchange, 1995(2) Mh.L.J. 770 had occasioned to consider an identical submission. In this case of the Petition was

filed for declaration that there was no valid and subsisting or binding Arbitration Agreement. Declaration was also sought that the Respondent therein was not entitled to fill any vacancy caused by resignation of one person. After the Award was rendered against the Petitioner therein, Arbitration Petition was filed and various contentions were advanced. It was contended that during relevant period, the Petitioner was not the member of Bombay Stock Exchange and there were no contracts between the parties. The learned Single Judge did not accept the said submission regarding the ByeLaw No. 226(a). The learned Single Judge held that all contracts made by a member with a nonmember permitted on the Exchange, shall be deemed to be made subject to the Rules. It was also held that the ByeLaws No. 226(a) and 226(c) make it clear that even though there may not be contract notes, the Agreement will be subject to rules ByeLaws and regulations. Therefore, arguments that because there is no contract note, the ByeLaws will not be attracted, was negatived. The reliance has been placed on this decision by the learned Arbitrator. There can be no error in this approach.

12. The second contention that was advanced was regarding trading on the floor. This contention was dealt with in the decision of Division Bench of this Court. In Hemendra V. Shah vs Stock Exchange (supra), where the Division Bench held that, considering the fact it was admitted position that there was no dispute between the parties which fell within the ByeLaws and even the transaction was not done on the trading system of the exchange, the ByeLaws and the Arbitration clause, would not be attracted. The Division Bench did not interfere with the findings of fact recorded that the transaction was not within the ambit of the ByeLaws.

13. In the ByeLaw No. 247A which deals with the regulations and transactions between the clients and brokers lays down various interse rights and liabilities. Clause 247A(2) mandates member broker to keep separate accounts of client's securities and keeping such books of accounts as may be necessary, inter alia providing for securities received for sale. Therefore, even without there being trading on the floor, dispute may arise between a client and broker in respect of the transactions enumerated in clause 247A.

14. Therefore, various factual situations can arise in respect of the clause 248A and whether the dispute between the member and non member would fall within the ambit of clause 248A. The decision of the learned Single Judge and Appellate Bench dealt with same such factual instances. Considering the wide language of clause 248A, no absolute proposition can be laid down. It will depend ultimately on what is exact nature of dispute for the application of this clause. Therefore, arguments of Mr. Purohit as an absolute position of law cannot be considered, without reference to the factual position.

15. Turning to the facts of the case, she is resident of Canada. A client code was allotted to the Respondent in view of various dealings with the Petitioner earlier. The Respondent asserted that shares were deposited with the Petitioner for facilitating delivered in the market as and when the Respondent decided to sell

shares. Therefore, the act of depositing the shares with the Petitioner was in furtherance of the steps to be taken of trading. The Respondent kept the shares with the Petitioner with intent. When the Respondent decided not to sell the share and sought for the shares back, they were not returned and therefore, a dispute arose.

16. The stand of the Petitioner when the dispute arose needs to be noted. The letters issued by the Petitioner to the Respondent from 5 December 2006 to 23 June 2011 are on record. Petitioner confirmed the position that the Petitioner was holding the shares in dematerialised form and details were given about dividend paid and the shares returned. So till the year 2011, the Petitioner unequivocally kept on accepting the position that the shares were with the Petitioners and were kept for safe keeping. When the Respondent addressed a letter dated 20 September 2011 asking for the shares back, again the correspondence ensued between the parties wherein the Petitioner stated that if some time is given, the position would be confirmed. However, since no concrete response was received from the Petitioner, a complaint to the Investors Forum was lodged by the Respondent on 5 July 2012. On 11 September 2012 when the reply was given by the Petitioner, it was stated that no such shares were received and in the alternative, even if they are received, it was for account of some third party. Thereafter, the parties had gone before the Arbitrator wherein the Petitioner reiterated the stand.

17. As rightly stressed by Mr. Jagtiani, the stand taken by the Petitioner in the letter dated 11 September 2012, completely denying even the fact that shares were ever lodged, was dishonest. There cannot be alternate submissions that the shares were not received, yet proceed to give an explanation that they were received on part of some third party. It was also pointed out that the stand that dealings were in respect of third party was only a reference to the last letter and when the claim was filed by the Respondent, the Petitioner proceeded to deny even the earlier correspondence. Therefore, the learned Arbitrator took note of these clear transactions and relationship between the Respondent and the Petitioner wherein the Petitioner had kept the shares with the Respondent with an intention to selling them as and when the Respondent sought fit pursuant to the instructions of the Respondent. Considering the language implied in ByeLaw No. 248A, such transaction between the Petitioner and Respondent clearly fell within the language "incidental and relating to the dealings in shares". There is no reason to take any different view that the one taken by the learned Arbitrator, which is in consonance with the language of ByeLaws.

18. As far as the contention of the learned Counsel for the Petitioner in respect of the limitation is concerned, again it cannot be a pure question of law. If the correspondence between the parties is noted till the Respondent sought for the shares back, stand of the Petitioner was that they were kept with the Petitioner. At no point of time, stand was taken that the transaction was a third party transaction and that the shares were never received. When the letter issued on

20 September 2011, the Petitioner continued to assure the Respondent in respect of the return of shares and only sought to by time by giving non specific replies. For the first time in the reply to the complaint made by the Respondent that the stand is taken denying the responsibility to return the shares. Thereafter, the Respondent lodged the claim in February 2013. The learned Counsel for the Respondent has pointed out that when the claim was denied on 20 September 2011, the claim was lodged in February 2013. Stand was taken by the Petitioner refusing to even acknowledge the fact of deposit of shares in September 2012 and the claim was lodged in February 2013. Both the learned Arbitrator and the Appellate Tribunal have dealt with the issue of limitation in extension. The Tribunal has noted the ByeLaw No. 252(2) and rightly held that the Respondent denied the liability to return the shares on 11 September 2012 and thereafter, the claim was filed within time.

19. As far as the contention regarding ByeLaw No. 244 is concerned, the contention of Mr. Purohit that if a member fail to complete the performance of contract by delivery of payment, then the constituents can seek a Close Out within 15 days and submitted that the shares were kept for 11 years and the Respondents should have sought Close Out, if there was any failure on the part of the Petitioner for committing breach of contract. Mr. Jagtiani urged that clause 244 is part of the scheme in a chapter that deals with the actual trading on the floor and the consequence thereof. It is his contention that it is only in the contingency of an active trading that the aspect of Close Out would come in play. This contention is correct. This submission of Mr. Purohit is yet another attempt to wriggle out of clear liability of the Petitioner. Firstly the ByeLaw 244 was held against the Respondent by the Arbitrator by culling out a principle of limitation therefrom to deny the complete claim. This exercise was corrected by the Appellate Tribunal holding that the said clause is not applicable. The clause 244 as it reads deals with the failure of the member to complete performance of the contract by delivery or payment. It states that in case of such failure, the constituents can Close Out such contract to other member within 15 days from the date of default and any loss or damages sustained. The case at hand was a simplistic case of depositing of the shares with the Petitioner till instructions were received to sell the same. Once the Respondent decided not to sell the shares, the Petitioner was of under duty to return the same. The Petitioner itself has accepted that they were kept the same for safe custody. Therefore, the Petitioner accepted its own liability to return the shares as and when called for. Once the Petitioner made its intention clear not to return the shares, the claim was moved by the Respondent. In such a situation, there is no question of failure to comply with the contract as contemplated under clause 244, so that concept of Close Out will apply.

20. As far as the theory that the shares were given in respect of some unrelated transactions, the Petitioner has utterly failed to place any cogent material in that regard. Once the Respondent filed a claim pointing out the above factual position and bringing the claim within the ambit of ByeLaws No. 248A, the Petitioner

ought to have placed on record what was the nature of transaction to bring it outside the purview of ByeLaws No. 248. The learned Counsel for the Petitioner had to accept that adequate pleadings are not placed on record by the Petitioner to demonstrate the correct nature of transaction. Apart from this position, the first stand of the Petitioner was that no such shares were received.

21. Therefore, the present case is where the constituent had deposited the shares with the Petitioner for safe keeping till further instructions for selling the same. This was an entrustment due to the position of the Petitioner as a broker recognized by the Stock Exchange. The relationship between the parties was of trust. After acknowledging for almost a decade that the share continued to be kept in safe custody, the Petitioner, when called upon to return the same, took various stands, which can only be termed as totally dishonest. The Petitioner did not even bother to disclose the whereabouts of the shares. These facts have been rightly noted by the learned Arbitrator and the Appellate Tribunal.

22. There is no merit whatsoever in the challenge. The Arbitration Petition is dismissed with costs of Rs. 50,000/(Rupees Fifty Thousand only) payable to the Respondent.

23. The entire object of framing ByeLaws is regulate trading on the floor and related activities, is to ensure smooth functioning of Stock Exchange. This is possible only if the relationship between a broker and the constituent remains such that trust can be reposed and the constituent has a guarantee that his grievance will be looked into by the Stock Exchange. It is for this purpose the dispute resolution mechanism is provided. If such completely dishonest stands are taken by the Brokers, simply usurping the shares of the constituents, it will shake the confidence of the constituents in the functioning of the Stock Exchange. Instead of making good the loss, the Petitioner has resolutely refused to take remedial steps in all forums taking all possible stands, alternate or contradictory, without any basis in law, simply to avoid the liability. Even in this Court, I had given an opportunity to the Petitioner to avoid costs or to avoid making any adverse observations, but there was no response. Such conduct of the members can be taken note by the Stock Exchange, if it wants to instill confidence in the minds of the constituents, by taking suitable action. Registry to send a copy of the order to the Managing Director of the Bombay Stock Exchange for information.